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NO. 93-2034

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ANTHONY SHORT

Petitioner

v

EDISON CHOUEST OFFSHORE, INC. ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1. The Issue Was Presented Below

Respondent argues that Petitioner's attorney failed to properly express the questions presented or to establish that the questions presented were raised in the lower court. The very issue presented here, i.e. that the Courts of Alabama failed in this case to apply proper maritime law principles was presented and argued below. Attached hereto as Exhibit A, are pages 31 through the middle of page 46 of the Appellant's brief filed with the Alabama Supreme Court wherein such argument was advanced.

2. What Standard of Proof Was Required By the Court Below

Respondents argue that Petitioner is misrepresenting to this court the ruling of

the court below.[1] Respondents take the position that the law applied by the court below did not require Mr. Short to identify the single chemical substance which caused or triggered his occupational asthma. Respondents contend the courts below only required petitioner to make a showing of evidence of a defect.

If the Alabama trial court and Supreme Court did not require Mr. Short to prove which specific chemical compound triggered his occupational asthma, then why was the motion for summary judgment granted? Large quantities of breathable chemicals in areas of a vessel where the crew works without proper respiratory protection is a defect. Davis v. Odeco,

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[1]The entire opinion of the court below was copied as Appendix A to Petition for Writ of Certiorari.

Inc., 18 F.3rd 1237 (5th Cir. 1994). Where the exposure to such chemical dusts causes injury, there is a cause of action.

What did the court require Mr. Short to prove? Paragraphs 1 through 4 of its Findings of Fact acknowledge that Mr. Short was a seaman who as a result of 15 years of exposure to chemicals aboard respondents' vessels developed occupational asthma.[2] The court at that point could have found that there was sufficient evidence for the case to go to the jury under the Jones Act and the General Maritime law.

Notwithstanding the above, the court then stated in paragraph 5 of the Findings of Fact:

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[2]The very diagnosis of "occupational asthma" is a diagnosis that the asthma is attributable to conditions in the workplace.

> "Significantly, neither the plaintiff nor his physician can identify any substance aboard defendants' vessels which caused this condition. Neither can the plaintiff or his physician identify the time or place of the plaintiff's exposure to any such unidentified substance. In fact, Dr. Lorino stated in his deposition that he did not 'know of any specific substances or names that the plaintiff was exposed to.'"

The court in paragraph 5 of its Conclusions of Law stated:

> "the plaintiff is unable to identify any substance aboard any of defendants' vessels as the causative agent of his asthma and is thus unable to identity the instrumentality which caused his alleged injury."

The door was then shut on Mr. Short's case in paragraphs 6 and 7 of the court's Conclusions of Law when the court held that since he could not identify the substance that caused his occupational asthma, he necessarily could not show a defect and thus he had no remedy.

Chemical dusts, etc. in a workplace

with no suitable respiratory protection provided for seamen is certainly a defect that renders a vessel unseaworthy. Since the court found such exposure and found that such exposure caused or contributed to Mr. Short's asthma, then the only explanation for the ruling is that the Alabama Courts erroneously concluded that Mr. Short had to identify a specific substance as the causative agent.

3. The Defect

During his 15 year employment with respondents, Mr. Short was exposed to heavy concentrations of various chemical dusts, fumes and mists (including those listed in Mr. Short's affidavit, attached hereto as Exhibit B) all without proper respiratory protection. That exposure, according to his treating physician was the cause of his occupational asthma.

The question presented here and the question presented below is whether the above uncontradicted facts state a cause of action under the General Maritime law or the Jones Act.

Why are not large quantities of chemical dust "a substance." Why are the dozen or more specific chemicals listed in Mr. Short's affidavit not "identified substances" to which he was exposed. Why was the affidavit of Safety Expert Mallory J. Lessard marked as Exhibit C not considered or commented on. Why did the court disregard the opinion of treating physician Dr. Gaeton Lorino, (affidavit attached hereto as Exhibit D)[3] who stated

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[3] The affidavit of Dr. Gaeton R. Lorino, as well as his deposition testimony, was before the Supreme Court of Alabama, as shown by the court's order (attached hereto as Exhibit E) of February 4, 1994, denying respondents' motion to

in deposition testimony that exposure to the various chemical dusts, mists and fumes (substances) during Mr. Short's employment was to a reasonable degree of medical certainty the cause of his asthma.

The reason the courts below did not consider the volume of evidence showing chemical exposure with no respiratory protection was that the courts applied improper law to this case, i.e. products liability law and a legal requirement that Mr. Short must identify the chemical that triggered his asthma.

The exposure to the large quantities of chemicals without proper respiratory protection which resulted in occupational asthma, all as set out above, created a jury question under the General Maritime

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strike such affidavit.

law and/or the Jones Act. Certiorari should be granted in order to consider if the unique law of Alabama which resulted in summary judgment in this case is to be allowed to stand as the maritime law applicable to seamen's cases brought in Alabama courts.

4. Summary

The requirement of the Alabama Courts that a seaman exposed for 15 years to large quantities of known and unknown chemicals without respiratory protection, which exposure caused his occupational asthma, must identify a single specific substance, time, and place, is a departure from recognized Admiralty law principles. All Mr. Short needed to do was to show that the chemicals to which he was exposed without proper respiratory protection caused or contributed in some manner to his illness.

The alternative application of product liability law by the court below is improper, in that there is a large viable body of maritime law to apply. Product liability law is founded in contract and does not consider the well-established Admiralty law principle that a vessel owner takes his crewmen as he finds them; that the crewman does not assume the risk of exposure to various chemicals; and that notice or knowledge is immaterial when there is a condition onboard which causes injury to a seaman.

In view of all of the above, this Court should accept certiorari, and if this Court concludes that the courts of Alabama were in error in requiring Mr. Short to prove an impossibility and in applying product liability law to Mr. Short's General Maritime law and Jones Act case,

then the case should be reversed and remanded, with instructions that the affidavits, depositions and documents before the court below created jury questions which require a jury trial with the jury to be instructed as to proper and applicable law for this Admiralty case.

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APPENDIX A

BRIEF OF APPELLANT ANTHONY SHORT
IN THE SUPREME COURT OF THE
STATE OF ALABAMA, PAGES 31 THROUGH 46

SEAWORTHINESS REMEDY

The Court below apparently ignored the fact that Mr. Short is a seaman with a cause of action for unseaworthiness. There was a factual question as to whether the ehemicals that he breathed were harmless or harmful. There was substantial evidence that they were harmful. Dr. Lorino testified that the various chemicals caused Mr. Short's illness. That testimony of itself is sufficient to go to the jury on causation and unseaworthiness. There was no evidence tendered by Edison Chouest that the chemicals breathed by Tony Short were in fact harmless or that they did not cause the occupational asthma. The question of whether the chemicals were harmful or

harmless, or did or did not cause this illness created a factual issue as to unseawothiness.

The defendants owed to Mr. Short an absolute and continuing obligation to provide him with a safe place to work. Mahnich v. Southern Steamship Co., 321 U. S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944). The vessels on which he worked were unseaworthy in that during his employment he was exposed to noxious chemical dusts, vapors, fumes, etc. The vessels did not have aboard for his use proper respiratory protective devices. The vessels did not have vacuum cleaners or sweepers for the tanks which required the tanks to be broom swept, thus exacerbating the dust, fume and vapor situation.

The liability of the Edison Chouest companies under the doctrine of unseaworth-

iness does not rest upon fault or negligence. Johnson v. Offshore Express, Inc., 845 F.2d 1347 (5th Cir. 1988); Hussein v. Isthmian Lines, Inc., 405 Fed.2d 946 (5th Cir. 1968). Unseaworthiness is a condition and how that condition came into being - whether by negligence or otherwise - is quite irrelevant to the owner's liability for personal injuries resulting from it. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1970). it does not matter whether defendants knew or should have known that the chemical dusts to which they exposed Mr. Short were harmless or harmful - actual knowledge is not a factor. The seaworthiness concept shifts the risk that the dust which Mr. Short might breathe might trigger asthma from the seaman, Mr. Short, to the shipowners, the Edison

Chouest companies. Waldron v. Moore-McCormack Lines, Inc., 368 U.S. 724, 728 (1966).

> "The warranty of seaworthiness in personal injury cases essentially depends upon neither common law tort nor contract concepts. Demas v. LeHigh Valley Railroad, 234 Fed.2d 151, 153 (2nd Cir. 1956). Instead, while the seaworthiness doctrine is comprised of both tort and contract elements, it is a creature of twentieth-century judicial policy concerning risk distribution in the shipping industry. Delome v. Union Barge Line Company, 444 Fed.2d 225 (5th Cir. 1971). The seaworthiness warranty is essentially a species of liability without fault." Delome, at 229.

Under the unseaworthiness cause of action the shipowner is required to have in place safety procedures to require use of necessary protective devices. Edison Chouest had no such procedures. Weeks v. Alonzo Cothron, Inc., 466 F.2d 578 (5th Cir. 1972). The use of defective or inadequate equipment or gear not reasonably

suited for the purposes for which it was used, such as the improper dust mask furnished to plaintiff, rendered vessels upon which plaintiff worked unseaworthy. Usher v. Luckenbach Overseas Corp., 400 U.S. 494, 491 S.Ct. 514, 517-18, 27 L.Ed.2d 562, 567 (1971). The presence of chemical dust and fumes in the vessels' working area makes the vessel unseaworthy. Smith v. Ithaca Corporation, 612 Fed. 2d 215 (5th Cir. 1980). Edison Chouest was thus required to furnish a vessel with work areas free from the dust which caused the illness to the plaintiff. Having presented to the court substantial factual evidence that Chouest did not do so, the question of general maritime law liability was for the jury.

TONY SHORT'S JONES ACT REMEDY

The Jones Act is remedial and welfare legislation which created rights to the

seaman for damages arising from maritime torts and was intended to give protection to the seaman and those dependent upon his earnings. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 375, 77 L.Ed. 368, 373, 53 S.Ct. 173 (1932). The Jones Act remedy is quite broad and Jones Act negligence as well as unseaworthiness for that matter can be a per se result of regulatory violations of the type set out in Mr. Lessard's affidavit (App. 2). Smith v. Transworld Drilling Company, 772 F.2d 157 (5th Cir. 1985). The safe place to work concept is not only a part of the unseawothiness remedy but the vessel owner is deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe work environment. Ober v. Penrod Drilling Co., 726 Fed.2d 1035 (5th Cir. 1984); Ceja v. Mike Hooks, Inc., 690 Fed.2d

1191 (5th Cir. 1982). There was evidence from which a jury could have concluded that a chemical dust laden atmosphere was not a reasonably safe place to work.

Under the Jones Act the defendant Edison Chouest companies must bear the responsibility for any negligence, however slightly it played a part in producing plaintiff's injury. Landry v. Oceanic Contractors, Inc., 731 Fed.2d 299, 302 (5th Cir. 1984).

> "Under the Jones Act cases a jury is entitled to make permissible inferences even from unexplained events. Martin v. John W. Stone Oil Distributing Co., 819 Fed.2d 547, 549 (5th Cir. 1987).

In addition to all of the above, the Jones Act is to be liberally construed in favor of the injured seaman who is a ward of the court with a featherweight burden of proof. Spinks v. Chevon Oil Co., 507 F.2d

216 (5th Cir. 1975).

The facts as submitted to the Trial Court in opposition to the motion for summary judgment were not only sufficient to defeat such motion, but were sufficient, particularly under the liberal construction required, to create a prima facie case for plaintiff Tony Short on his Jones Act and unseaworthiness remedy. The court was in error in concluding that plaintiff could not offer any evidence in support of either such remedy and the court was in error in granting the motion for summary judgment.

CAUSAL CONNECTION REQUIREMENTS

The Court Below, in spite of the medical testimony to the contrary (R.450, 451), concluded that Tony Short had to bring to the court a single specific chemical as being the undisputed cause of

his asthma (R.524). Not only did Dr. Lorino state that such a burden is a medical impossibility, but he stated in his deposition that such was not required for the diagnosis nor for the finding that the occupational asthma was a result of ship-board exposure (R. 448, 450-451). There was no medical evidence to the contrary. Even had there been medical testimony to the contrary it would have only created a factual issue for resolution by the jury.

Even testimony of a mere possibility of a causal relationship between an injury and an unseaworthy condition or Jones Act negligence would have been sufficient for the case to go to the jury. The very definition of "occupational asthma" as being a form of asthma caused by exposure on the job together with the diagnosis of such creates a factual question (R. 436).

In Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173 (1959) the court concluded that where the plaintiff claimed that his preexisting lung condition had been aggravated as a result of exposure onboard and while none of three medical witnesses were willing to definitely attribute the aggravation of plaintiff's illness to the incident in question, they each indicated that it was a possible or probable cause. The court upheld the jury verdict, stating that:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause***. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were

> entitled to take all circumstances, including the medical testimony into consideration." Id 361 U.S. at 109.

In a Jones Act case the plaintiff need not make a showing that the employer's negligence was the sole cause; there must only be some showing that a causal relationship existed. Mayhew v. Bell Steamship Co., 917 Fed.2d 961 (6th Cir. 1990). It is not at all necessary that a single positive causative agent be identified in this case. The fact that a doctor may find that Mr. Short's condition is idiopathic, that is, he cannot point to a specific causative agent, is not controlling. Harrison v. Flota Mercante, 577 Fed.2d 968 (5th Cir. 1978). Notwithstanding that the case law says Mr. Short did not have to prove which single chemical triggered his asthma (an impossible burden), he did tender testimony

by Dr. Lorino that to a reasonable degree of medical certainty Tony Short's occupational asthma is a result of chemical dust exposure on the Edison Chouest companies' boats (R.454-455).

A well known text states:

> "It does not seem to be overstating *** much, if at all, to conclude that the plaintiff makes his prima facie case by showing that he was injured and that the injury could have been caused by the negligence of the shipowner (in furnishing defective equipment) ***. Apparently, the only way in which a defendant can win a directed verdict is to establish by indisputable and uncontroverted evidence both the cause of the accident and its own freedom from negligence." The Law of Admiralty, 2d ed., Gilmore & Black, p. 378.

There was sufficient evidence of causation to have allowed that issue to go to a jury.

THIS IS NOT A MANUFACTURER'S LIABILITY CASE.

The court concluded in granting summary judgment that Tony Short could not recover because of his unusual susceptibility to asthma. That may be a valid point of discussion in a products liability case, but in a tort case or unseaworthiness case or Jones Act case, a tortfeasor takes his victim as he finds him:

> "If the victim is highly vulnerable, that is the tortfeasor's bad luck; there is no discount to average damages. This is a thoroughly sensible principle, by the way. If a tortfeasor never had to pay more than the average victim's damages, victims as a class would be systematically undercompensated and tortfeasors as a class therefore systematically underdeterred, because victims with above average injuries would get their damages cut, while victims with below average injuries would not get an offsetting increase." Lancaster v. Norfolk & Western Railroad Co., 773 F.2d 807, 822 (7th Cir. 1985).

The Lancaster case is an FELA case, which act was incorporated by reference into the Jones Act, U.S.C.A. § 688. Alabama is in agreement:

> "It is the law in Alabama that when one negligently injures another so as to aggravate a pre-existing condition, the negligent actor is liable for all injuries proximately resulting therefrom, even though a normal person's injury would have been much less severe. This is in agreement with the general rule applied elsewhere." Henderson v. United States, 328 Fed.2d 502 (5th Cir. 1964). See also Norris, The Law of Seamen, 4th ed. Vol.2, §30.41 and Gamble, Alabama Law of Damages 2nd ed. p. 426.

The cases under the Alabama Workers Compensation Act also provide that the employer takes his employee subject to his physical condition when he enters his employment. Allen v. Metro Contract Services, Inc., 421 So.2d 1289 (Ala.Civ. App. 1982).

What then of the court's findings that the Chouest companies were not responsible because Mr. Short may have had a predisposition to asthma unlike other of the defendant's employees? The defendant Edison Chouest companies took Tony Short with his predilections toward asthma, if any, and if the conditions onboard their vessels or their negligence in whole or in part, influenced or aggravated or caused plaintiff asthmatic conditions, the defendants are liable therefor. The fact that Tony Short was susceptible to asthma rather than having a weak back or a thin skull makes no difference.

There are numerous cases in which employees have recovered from employers for aggravation of asthmatic conditions. In Curry v. United States, 327 Fed.Supp. 155 (N.D. Calif. 1971) defendant died from a

preexisting asthma condition as a result of polluted and noxious air in the engine room of a vessel. The court found liability notwithstanding the preexisting condition and applied in an Admiralty context asthma case the general rule that the tortfeasor takes his asthmatic victim as he finds him.

In Thompson v. Wells Lamont Corporation, 362 So.2d 538 (Miss. 1978) plaintiff recovered as a result of an allergic reaction to dust and lint. In Jenkins v. Ogletree Farm Supply, 291 So.2d 560 (Miss. 1974) plaintiff's asthma was aggravated as a result of inhaling dust particles, allowing a recovery against his employer. For years, Tony Short breathed, among other things, cement dust. In Concannon v. Oregon Portland Cement Co., 447 P.2d 290 (Oregon 1968) the plaintiff breathed cement dust during a period of one week while

working at a cement plant which rendered him totally disabled as a result of asthma, for which recover was allowed. The Michigan case of Tolottson v. Penn-Dixie Cement Corporation, 209 N.W.2d 611 (Mich. 1973) was another case where cement dust had caused the plaintiff's disability for emphysema for which he was allowed recovery. In Lang v. Birch Shipping Company, 523 Fed.Supp. 1112 (S.D.N.Y. 1981) the plaintiff was exposed to grain dust on the vessel where he was a seaman, from which exposure he developed chronic asthma. His theory was the same as Tony Short's, i.e. the shipping company failed to provide a safe place to work with adequate masks or other protective devices. The plaintiff recovered.

The application of products liability law to a seaman's personal injury case was

improper. The Kentucky law case of Gordon v. Proctor and Gamble, 789 F.Supp. 1384 (W. D. KY 1992) relied on by the court is totally inappropriate. None of the unique Admiralty law requirements stated above or set out below are part of a products liability warranty claim.

ASSUMPTION OF RISK

The Judge below in effect stated that the risk of a debilitating injury from unknown chemicals to which plaintiff was subjected while in the employ of the defendants was a risk to be borne by the plaintiff seaman and not the employer shipowner. That analysis of the law is incorrect. Assumption of risk is not a defense to a claim of unseaworthiness. Villers Seafood Co. Inc. v. Vest, 813 Fed.2d 339 (11th Cir. 1987) nor is assumption of risk a defense under the

Jones Act. Bobb v. Modern Products, Inc., 648 Fed.2d 1051 (5th Cir. 1981). Section 4 of the Railroad Employees Act, 45 U.S.C.A. § 53, abolished the defense of assumption of risk. Therefore, assumption of risk - a common law affirmative defense - is not available as a defense to an action brought by a seaman. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L.Ed. 265, 59 S.Ct. 263 (1939); Ceja v. Mike Hooks, Inc. 690 Fed.2d 1191 (5th Cir. 1982). In view of the above it was improper to place the risk upon Mr. Short that some unknown chemical encountered during his employment as a seaman might result in injury to him. By statute and by the general maritime law, the risk of such injury is transferred over to the employer, the Edison Chouest companies.

NOTICE OF DEFECT NOT REQUIRED

The Court Below concluded that before Tony Short could recover he had to show that the Edison Chouest companies had notice of the dangerous propensities of the exact chemical which triggered Tony Short's problem. That conclusion is contrary to the applicable law.

Notice of a dangerous condition or negligence in regard to that condition is immaterial in an action against a vessel owner for unseaworthiness under the general maritime law. Karvelis v. Constellation Lines, S.A., 806 Fed.2d 49, (2nd Cir. 1986) cert. den. 107 S.Ct. 1891, 481 U.S. 1015, 95 L.Ed. 498. A shipowner's lack of knowledge of a condition which renders a vessel unseaworthy is not a defense. Claborn v. Star Fish & Oyster co. Inc., 578 Fed.2d 983 (5th Cir. 1978). The duty to provide a seaworthy vessel is non-delegable and per-

tains to latent as well as patent defects and neither ignorance nor due diligence will serve as an adequate defense. Clevenger v. Star Fish & Oyster Co. Inc., 325 Fed.2d 397 (5th Cir. 1963).

> "Negligence or notice of defective condition is not a necessary factor to sustained the trial court's decision. As Judge Hincks said in Poygnant v. United States, 2nd Circuit, 1955, 225 Fed.2d 595, 596: 'Under the general maritime law an injured seaman, once he proves an injury caused by an unseaworthy condition, may recover without proof of negligence on the part of the vessel's owner. *** Since the inquiry in unseaworthiness cases is not directed to the issue of the owner's fault, it follows that prior notice, actual or constructive, of the unseaworthy condition is not essential to a cause of action based on that doctrine." Sprague v. The Texas Company, 250 Fed.2d 123 (2nd Cir. 1957).

The Edison Chouest companies cannot avoid their absolute duty by saying that they do not know what caused the particular

injury or suggesting in effect that it was an Act of God. Marshall v. Ove Skou Rederi A/S, 378 Fed.2d 193 (5th Cir. 1967).

Notwithstanding Edison Chouest's protestations that it did not know of any dangerous chemicals carried onboard its vessels, it should have known such. The case of White v. Rimrock Tidelands, Inc., 414 Fed.2d 1336 (5th Cir. 1969) involved an injury to a seaman from an exposure to drilling mud. There the court found that the absence of safety equipment for use by the seaman directed to enter the tank containing caustic drilling mud amounted to unseaworthiness. The fact that safety equipment may not have been provided by other drillers in the business was not controlling. There have been other injuries to seamen as a result of exposure to drilling mud while cleaning mud tanks,

an operation that Tony Short did on a regular basis.

The Court was incorrect in concluding that Tony Short could not recover unless he could prove that defendants knew of the specific chemical that caused his injury.

DUTY TO INSPECT

Edison Chouest has testified that it had no knowledge of the chemicals carried onboard its vessel and it made no effort whatsoever to determine such (R.312-313). Notwithstanding, the court concluded that since they had no knowledge they cannot be responsible. That position is totally contrary to the applicable law. A ship-owner has an obligation to inspect his vessel for hazards. Failure to inspect a vessel for hazards is Jones Act negligence. Joyce v. Atlantic Ritchfield Co., 651 F.2d 676, 681 (10th Cir. 1981); Davis v. Hill

Engineering, Inc., 549 Fed. 2d 314 (5th Cir. 1977); Matter of Texaco, Inc., 570 Fed.Supp. 1271 (E.D. LA 1983).

The failure of the Edison Chouest companies to make any inquiry as to the type of chemicals to which it was exposing its employees while making no effort to ascertain if those chemicals were or were not harmful to their health, is a violation of its duty under the Jones Act and under the general maritime law. They cannot simply close their eyes and plead ignorance as to the work conditions onboard their vessels.

APPENDIX B

AFFIDAVIT OF ANTHONY E. SHORT

Personally appeared before me, the undersigned authority in and for the State of Alabama and County of Mobile, ANTHONY E. SHORT, who being by me first duly sworn, on oath deposes and says:

I am the plaintiff in the above captioned matter. Shortly after completing high school in Bayou la Batre, Alabama, I went to work with defendants, who operate about 30 offshore supply boats, tugs and other large vessels. I started as a deckhand in 1977 and worked my way up to Captain of 185' offshore supply boats. My entire work career of 15 years since 1977 was with the defendants and my last employment was with defendants in April 1992.

During my 15 years with the Edison

Chouest companies I was regularly exposed to, breathed and ingested heavy concentrations of mineral and chemical dust, fumes and mist. The only such exposure I have had was in connection with my employment with defendants.

For my well being and respiratory protection while onboard defendants' vessels I relied entirely upon Edison Chouest. I have no chemical education and have received no training in recognizing different harmful chemicals, minerals, acids and other compounds, vapors and fumes encountered by me on a regular basis during my employment. I frequently did not know the chemical and mineral composition of the various cargoes carried onboard my vessel and I was exposed to heavy concentrations of such mineral and chemical dusts, fumes and mists by the necessity of broom

sweeping the cargo tanks, hosing down the liquid tanks and spraying various chemicals.

During the first approximately 15 years of my employment with Edison Chouest I was provided only with paper masks of the type that comes in the box, a copy of which is attached hereto as Exhibit A. On many occasions I cleaned tanks without any mask because they were not provided by defendants. Edison Chouest had no safety program to provide proper respiratory protection to its employees. Defendants knew that I was on a regular basis exposed to heavy concentrations of various chemical and mineral dusts, fumes and mists, the chemical and mineral makeup of which I had no knowledge. During my employment with Edison Chouest I made no notes of the chemicals to which I was exposed and

undoubtedly there were many such chemicals or minerals in addition to those listed below.

During the 15 years of my employment with defendants I was regularly exposed to and breathed dust or mist or fumes from hydrochloric acid which was regularly used in an undiluted form to clean cement off the deck of the vessels, Aluminex, a corrosive aluminum cleaner the specific chemical makeup of which I do not know, various polyurethane varnishes which were applied and sanded down, various paints including multi-part epoxy paints, diesel fumes, and various other cleaning fluids and compounds used onboard the vessel. I broom swept dry bulk tanks, which required me to spend long periods of time in heavy dust atmospheres and cleaned liquid tanks by going into such tanks with a hose, which

exposed me to heavy mist and vapors from such liquids.

I regularly cleaned liquid tanks which contained oil based liquid drilling mud and water based liquid drilling mud. Drilling mud is barium sulphate, which contains various heavy metals and additives, some of which are shown on the attached safety data sheets of various additive products. The drill mud tanks had a strong chemical odor but at the time I cleaned such tanks I was not aware of the exact type of chemicals that were added. I now know that the barium sulphate, or drilling mud, that I was exposed to in both dry and liquid forms often contained formaldehyde as a fungicide.

I was also exposed to calcium chloride and calcium bromide in the liquid tanks and washed down liquid tanks that brought mud

from the rig to shore tanks, which mud contained various unknown chemical and mineral additives. I was exposed to drill mud from various manufacturers or suppliers which included Bayroid, Magcobar, Mayronne, Imco, Milchem and Halliburton. I was exposed to heavy concentrations of cement on a regular basis which would contain D-46, a defoamant that has a distinct chemical smell, the precise composition of which is unknown to me, cement blend which contains various additives, Class H Neat cement with gel which is a silicone based additive, straight gel, which is powdered silicon with other chemicals, Pharox which is a red mud with pulverized metals of various types all in a dust form, Econolite additive to the cement, as well as dust from various bagged chemicals, the composition of which is unknown to me.

The barium sulfate (drill mud) had different weights because of different additives. The average weight of liquid mud was about 15 pounds, but I have handled it with additives that carried the weight to 22 pounds per gallon. Various heavy metals were added to cement and mud in order to increase the weight and lighteners of unknown composition added to decrease the weight. I breathed dust and fumes from all the above products.

Silicate additive D-75, an alkaline chemical with a pH of 11 is listed in the attached materials data sheet as toxic to mammals. Trinity Lightwate cement D-49, to which I was exposed, contained traces of chromium, various cement additives, and silicon dioxide which is a respiratory irritant, for which special respiratory protection was required, but which I was

never furnished. The cement dust which I breathed on a regular basis, according to the attached safety data sheet, is harmful if inhaled and should not be breathed. Other chemicals that I regularly was exposed to, such as D-Air 1 Antifoam Agent, copy of data sheet for which is attached hereto marked as Plaintiff's Exhibit 39, states that inhalation may aggravate asthma and other pulmonary diseases, is a carcinogen and repeated inhalation causes respiratory irritation and pneumoconiosis, with a warning that humans should avoid creating or inhaling dust. The cement on the data sheet attached as Plaintiff's Exhibit 41 states that it contains silicon and repeated overexposure could cause chronic lung disease. The same statement is found in Exhibit 42. Econolite additive to which I was exposed on a regular basis,

described in Plaintiff's Exhibit 40, requires for safe handling a type C supplied air respirator with a full face piece, helmet or hood operated in pressure demand mode or in continuous flow mode. The safety data information states that Econolite dust should not be inhaled. I was regularly exposed to and inhaled the above.

Edison Chouest did not supply any of its vessels with air-fed respiratory protection devices nor warn its employees, nor did it warn me, of any risk of breathing any of the chemicals to which I was exposed over my 15 years of employment. Edison Chouest vessels I worked on were unseaworthy in that they contained dusty atmospheres and chemical fumes and vapors to which I was exposed without proper respiratory protection. Defendants were

negligent in failing to set up a proper safety program to provide for respiratory protection, in failing to inquire or ascertain as to what chemicals its employees were required to breath, in failing to provide vacuum tank cleaners, and in failing to provide proper respiratory protection.

Prior to 1991 I did not have asthma, had never had asthma as a child, had never any respiratory problems until the asthma symptoms developed that rapidly got progressively worse until now a great many chemicals, dusts, mists and fumes trigger asthma attacks. Prior to developing asthma as a result of exposure as set out above, I was able to do my work as required. I am now unable to work.

s/ Anthony E. Short

Subscribed and sworn to before
me this 17th day of May, 1993.
s/ Joelene E. Brown
Notary Public, State at Large

APPENDIX C

AFFIDAVIT OF MALLORY J. LESSARD

Personally appeared before me, the undersigned authority, MALLORY J. LESSARD, who being by me first duly sworn, on oath deposes and says:

I am Mallory J. Lessard, Occupational Safety Consultant. I worked for many years in the offshore oil industry and have cleaned cement and mud tanks of the type cleaned by Anthony E. Short. I have worked as Safety Director for offshore oil production companies and have set up safety programs for such companies relating to the respiratory safety of its employees. I am familiar with the various government regulations, OSHA regulations, and United States Coast Guard regulations governing dust protection and in tank cleaning operations which appear to apply by analogy

operations which appear to apply by analogy if not by direct application, and I have studied the types of respiratory protection that was available to Edison Chouest for its employees during the applicable time period. Edison Chouest took my deposition in New Orleans on May 6, 1993, and has the complete details of my background and training.

Edison Chouest was in actual violation or violated the spirit of numerous government regulations including 29 C.F.R. 1915.151-152 and 1918.86 and 93 and 1926.57 and 46 C.F.R. § 90.

For many years Anthony E. Short was exposed to various chemical and mineral dusts, fumes, mists and other respiratory irritants and exposed to particularly high concentrations of dust while cleaning cement and drilling mud tanks. Edison

Chouest vessels on which Mr. Short worked were, in my opinion, unseaworthy in that work areas on those vessels contained heavy and dangerous dust, fume and mist concentrations with inadequate respiratory protective devices provided for the protection of the crew. If Mr. Short had predisposition to allergy, then that predisposition rendered the crew unseaworthy in the face of heavy dust concentrations which after years of exposure could trigger Mr. Short's present asthmatic condition.

In my opinion Mr. Short's employers, Edison Chouest, et al, were negligent in failing to provide proper respiratory protection, in failing to set up any type of safety program to provide proper respiratory protection and in acquiring no knowledge of the chemicals or mineral respiratory irritants or pathogens to which

the crew of its vessels were exposed.

In my opinion the Comfort Mask supplied to Mr. Short during his first 15 or so years of employment with Edison Chouest was not suitable for its intended purpose and its use rendered the vessel unseaworthy and Edison Chouest was negligent in providing those masks for cleaning cement and mud tanks. Even the respiratory devices provided occasionally over the last two years of Mr. Short's employment fell far short of being suitable for use, all of which rendered the vessels upon which Mr. Short worked unseaworthy and Edison Chouest, et al neligent in failing to provide a reasonably safe place for Mr. Short to work. Allowing a crew to broom sweep dust tanks with knowledge that the crew was doing so without providing the crew with adequate lung protection, created

an unsafe environment that Edison Chouest should have known was unsafe and that providing of a dust mask rather than a respirator exhibited conduct that could be considered as reckless disregard for the safety of its employees and a reckless and willful violation of well known safety standards.

s/ Mallory J. Lessard

Subscribed and sworn to before
me this 18 day of May, 1993.

s/ S. H. Schell

Notary Public

APPENDIX D

AFFIDAVIT OF GAETON D. LORINO

STATE OF ALABAMA

COUNTY OF MOBILE

Personally appeared before me, the undersigned authority in and for said county in said state, GAETON D. LORINO, being by me first duly sworn, on oath deposes and says:

I am Gaeton D. Lorino, M.D., Board Certified and Licensed by the State of Alabama, specializing in pulmonary medicine, and I practice at the offices of Mobile Diagnostic Center, 6701 Airport Blvd., Suite A-101, Mobile, Alabama. Anthony Short has been my patient since early 1992. Anthony Short has been diagnosed by me as having Occupational Asthma, which asthma resulted from his exposure to heavy concentrations of various

chemical dusts, mist and fumes, during the 15 years that he worked on various offshore supply boats in the employ of Edison Chouest Offshore, Inc. or ns associated Edison Chouest company.

My deposition was taken on the 2nd day of April, 1993, in a lawsuit pending in the Circuit Court of Mobile County by Anthony Short seeking compensation from his employer. In my deposition I testified that it was my opinion to a reasonable degree of medical certainty that Anthony Short has occupational asthma caused by his exposure to various chemical dusts, mists and fumes while working on boats. In the history that I have from Mr. Short he cleaned dry and liquid caro tanks during the 15 years that he worked offshore with Edison Chouest without proper respiratory protection and was exposed thereby to heavy

concentrations of chemical dusts and mists. I have reviewed the affidavit signed by Mr. Short on May 17, 1993, which affidavit, together with several material safety data sheets attached hereto, give a nonexclusive listing of the various chemicals and types of chemicals to which Tony was exposed over his 15 years employment with Edison Chouest companies. Several of the chemicals listed and to which Mr. Short was exposed are allergens known to cause occupational asthma and many of the chemicals listed in Mr. Short's affidavit and as shown on the safety data sheets could trigger asthma in anyone exposed to high concentrations of such chemicals over an extended period of time such as the time Mr. Short worked on offshore vessels.

In my opinion the materials to which Mr. Short was exposed during the 15 years

that he worked for Edison Chouest companies did cause Mr. Short to develop Occupational Asthma. The exposure to heavy concentrations over a long period of time to the materials listed in Mr. Short's affidavit of May 17, 1993, and the safety data sheets attached thereto, would, in my opinion, cause respiratory problems or result in damage to a person's respiratory system which may lead to a number of debilitating conditions, including occupational asthma. Exposure to such products in heavy concentrations without proper respiratory protection would, in my opinion, create an obvious danger of respiratory damage to employees so exposed and in my opinion, an employer should have known that such exposure was danagerous to its employees and could cause respiratory illness or asthma.

The exposure of Anthony Short to a wide range of chemical respiratory irritants and allergens over a long period of time was the cause of his occupational asthma. No one single chemical can be singled out as "the cause" of such occupational induced asthma, although the list of chemicals contained in Mr. Short's affidavit contains several, such as formaldehyde, which are known to trigger asthma, and are known to have caused occupational asthma. It is the totality of the exposure over a period of years to the large quantity of various known and unknown chemicals which resulted in Tony's occupational induced asthma and in my opinion it would be impossible to determine the exact chamical that triggered his problem, if there was just one. It could have been many chemicals, or combinations of such

which triggered his occupational asthma.

Various chemicals listed in Mr. Short's affidavit and the safety data sheets attached thereto are not harmless substances if breathed over a period of time in heavy concentration. In my opinion, any of the substances listed in such affidavit and data sheets are hazardous if the dust and mist of such are inhaled over a period of time. Mr. Short's present condition is not the result of a single allegeric reaction to a subtance, but is the result of his exposure to heavy concentrations of various chemicals over a long period of time. The various chemical dusts, mists, or any one of them, to which Anthony Short was exposed in the course of his employment with Edision Chouest companies was the causative agent of his occupational asthma, and that opinion is

clearly stated in my April 2, 1993 deposition.

s/ Gaeton D. Lorino

Subscribed and sworn to before
me this 17 day of June, 1993.

Sidney H. Schell

Notary Public

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

February 4, 1994

1921522

Anthony Short v. Edison Chouest Offshore, Inc. et al

(Mobile Cir.Ct.No.: CV-92-001715)

NOTICE

Motion to strike invalid authority and motion to strike affidavit of Gaeton Lorino are denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out aas same appear(s) of record in said Court.

Witness my hand this 4th day of Feb. 1994.

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama